

DEC 29 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAE HEE KIM, aka Yong Kim,

Defendant - Appellant.

No. 05-10633

D.C. No. CR-05-00005-SJO

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Guam
S. James Otero, District Judge, Presiding

Submitted December 17, 2008^{**}

Before: GOODWIN, WALLACE, and TROTT, Circuit Judges.

Jae Hee Kim appeals from the 14-month sentence imposed following his guilty-plea conviction for possession of 15 or more counterfeit or unauthorized access devices and aiding and abetting, in violation of 18 U.S.C.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§§ (2) and 1029(a)(3). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Kim contends that the district court erred by failing to afford him allocution as required under the Due Process Clause and Rule 32 of the Federal Rules of Criminal Procedure before it imposed his sentence in the middle of the applicable Guidelines range. The government does not dispute that Kim did not allocute during sentencing, but contends that the case is moot because he has been deported. This contention fails because Kim is still serving his term of supervised release. *See United States v. Rivas-Gonzalez*, 384 F.3d 1034, 1042 (9th Cir. 2004).

However, unless Kim returns to the United States, he cannot be resentenced because he cannot be present for sentencing or be afforded allocution, as required by Rules 32 and 43(a) of the Federal Rules of Criminal Procedure. In view of this circumstance, we affirm the sentence imposed by the district court, but do so without prejudice to an application by Kim to the district court to vacate his sentence and resentence him consistent with this disposition within 30 days after such time, if ever, he is in this country and available for resentencing. *See United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1065 (9th Cir. 2004).

AFFIRMED.